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March 15, 2005

Honorable Pat Miller, Chairman  
Tennessee Regulatory Authority  
ATTN: Sharla Dillon, Dockets  
460 James Robertson Parkway  
Nashville, TN 37243-5015

**VIA HAND DELIVERY**

Re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes of Law; Docket No 04-00381

Dear Sharla:

Enclosed for filing please find the original and 13 copies of Joint ~~Amendments~~<sup>A</sup> Petitioners' letter to Deborah Tate as the Hearing Officer in the above-referenced matter attaching a copy of an Order issued by the Illinois Commerce Commission.

Thank you for your assistance. If you have questions, please do not hesitate to contact me

Sincerely,



H. LaDon Baltimore  
Counsel for Joint Petitioners

LDB/dcg  
Enclosures  
cc: Parties of record

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Kristin Ellis Berexa  
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Of Counsel  
H. LaDon Baltimore

March 15, 2005

Honorable Deborah Taylor Tate, Director  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37243-5015

**VIA HAND DELIVERY**

Re: Petition to Establish Generic Docket to Consider Amendments to Interconnection  
Agreements Resulting From Changes of Law; Docket No. 04-00381

Dear Hearing Officer Tate:

This letter is addressed to you as Hearing Officer in the above-referenced matter.  
Attached is a copy of an Order issued by the Illinois Commerce Commission on March 9, 2005  
which supports the position of the Joint Petitioners, KMC, NuVox/NewSouth, and Xspedius.

Thank you for your attention to this matter.

Sincerely,



H. LaDon Baltimore  
*Counsel for Joint Petitioners  
KMC, NuVox/NewSouth, and Xspedius*

LDB/dcg  
Attachment

**Certificate of Service**

The undersigned hereby certifies that a true and correct copy of the foregoing has been  
forwarded via U. S. Mail, first class postage prepaid, overnight delivery, electronic transmission,  
or facsimile transmission to the following, this 15th day of March, 2005

Guy Hicks, Esq.  
BellSouth Telecommunications, Inc.  
333 Commerce Street, Suite 2101  
Nashville, TN 37201

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Deborah Taylor Tate, Director  
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**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

<b>Cbeyond Communications, LLP,</b>	:	
<b>Global TelData II, LLC f/k/a</b>	:	
<b>Global TelData, Inc.,</b>	:	<b>05-0154</b>
<b>Nuvox Communications of Illinois, Inc.</b>	:	
<b>and Talk America Inc.</b>	:	
<b>-vs-</b>	:	
<b>Illinois Bell Telephone Company</b>	:	

**ORDER GRANTING EMERGENCY RELIEF**

By the Commission (through its Administrative Law Judge)

**I. Procedural History**

On March 7, 2005, Cbeyond Communications, LLP, Global TelData, Inc., Nuvox Communications of Illinois, Inc., and Talk America, Inc. ("Complainants"), filed this verified Complaint against Illinois Bell Telephone Company, d/b/a SBC Illinois ("SBC"), alleging that SBC is in violation of each of the following its interconnection agreements ("ICAs") with each of the Complainants; its Illinois intrastate tariffs, Section 13-801 Illinois Public Utilities Act ("Illinois Act")<sup>1</sup>, the Commission's Order in Docket 01-0614, the Federal Communications Commission's ("FCC's") SBC/Ameritech Merger Order, provisions of the FCC's Triennial Review Remand Order ("TRRO")<sup>2</sup>; and Section 13-514<sup>3</sup> of the Illinois Act. Applicants contend that SBC has affronted these authorities by issuing Accessible Letters stating that, effective March 11, 2005, SBC will not accept new orders for certain unbundled network elements ("UNEs") and will increase certain UNE rates.

The Complaint also contains a request for emergency relief. The specific components of that request are set forth in Section III of this Ruling, below.

On March 8, 2005, SBC filed a Response in Opposition ("Response") to Complainants' request for emergency relief. SBC urges the Commission to deny that request in all respects.

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<sup>1</sup> 220 ILCS 5/13-801

<sup>2</sup> Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313; CC Docket No. 01-338, Order on Remand, (released Feb. 4, 2005).

<sup>3</sup> 220 ILCS 5/13-514

## II. The Complaint

As discussed above, the Complaint alleges violations of the parties' respective ICAs, the Illinois Act, SBC's Illinois tariffs, and Orders issued this Commission and the FCC. The Complaint seeks declaratory and injunctive relief with respect to these claims, as well as damages, costs and fees. Complainants also request the imposition of penalties on SBC. All of the purported violations arise from SBC's publication of Accessible Letters stating that SBC would not accept or process new orders for mass market switching, DS1, DS3 and dark fiber loops and dedicated DS1, DS3 and dark fiber transport.

Complainants aver that they have each satisfied the notice requirement in subsection 13-515(c) of the Illinois Act by sending letters to SBC on March 2 and 3, 2005, requesting that SBC correct certain conduct identified in that correspondence within 48 hours. Complaint, Ex. A. SBC apparently received that correspondence, as evidenced by electronic mail attached to the Complaint. *Id.*

## III. Emergency Relief Requested

Complainants ask for emergency relief in the following manner: "Grant [Complainants] an emergency order pursuant to Section 13-515(e) of the [Illinois Act] as requested herein." The Commission assumes that this general request is associated with the following elements in the prayer for relief in the Complaint:

C. Order SBC Illinois to cease and desist from its breaching the terms of the current interconnection agreements between it and the individual Joint CLECs,

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E. Order SBC to cease and desist from violating Section 13-801(a), Section 13-801(d)(3) and Section 13-801(d)(4) of the Illinois Public Utilities Act;

F. Order SBC to cease and desist from violating the Commission's findings in its Order in ICC Docket No. 01-0614;

G. Order SBC to cease and desist from violating the provisions of its valid intrastate tariffs obligating SBC Illinois to provide unbundled access to network elements and combinations of network elements at the tariffed rates,

H. Order SBC to cease and desist from violating the FCC's findings in the *SBC/Ameritech Merger Order*;

I. Order SBC to cease and desist from violating Sections 13-514(1), 13-514(2), 13-514(6), 13-514(8), 13-514(10), 13-514(11) and 13-514(12) of the Illinois Public Utilities Act;

J Order SBC to cease and desist from any imposition of unreasonable obstacles or charges on the Joint CLECs attempts to commingle special access and UNEs

#### **IV. Applicable Statute**

The law governing a request for emergency relief by a telecommunications provider is set forth in subsection 5/13-515(e) of the Illinois Act

If the alleged violation has a substantial adverse effect on the ability of the complainant to provide service to customers, the complainant may include in its complaint a request for an order for an order for emergency relief. The Commission, acting through its designated hearing examiner or arbitrator, shall act upon such a request within 2 business days of the filing of the complaint. An order for emergency relief may be granted, without an evidentiary hearing, upon a verified factual showing that the party seeking relief will likely succeed on the merits, that the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted, and that the order is in the public interest. An order for emergency relief shall include a finding that the requirements of this subsection have been fulfilled and shall specify the directives that must be fulfilled by the respondent and deadlines for meeting those directives. The decision of the hearing examiner or arbitrator to grant or deny emergency relief shall be considered an order of the Commission unless the Commission enters its own order within 2 calendar days of the decision of the hearing examiner or arbitrator. The order for emergency relief may require the responding party to act or refrain from acting so as to protect the provision of competitive service offerings to customers. Any action required by an emergency relief order must be technically feasible and economically reasonable and the respondent must be given a reasonable period of time to comply with the order.

220 ILCS 5/13-515(e)

## V. Commission Analysis and Conclusion

Initially, the Commission concludes that discontinuing the offering of certain UNEs meets the threshold requirement in subsection 13-515(e) that the conduct alleged in a complaint must have "a substantial adverse effect on the ability of the complainant to provide service to customers." As Complainants argue, the sudden inability to offer certain products to end-users may result in the loss of customers and difficulty in competing for new customers.

In the context of ruling Complainant's request for emergency relief, we find it necessary to consider only whether the Federal Communications Commission ("FCC"), in the TRRO, held that any changes to an existing ICA for the purpose of implementing the TRRO must be accomplished through the negotiation, mediation and arbitration procedures contained in Section 252 and the parties' respective ICAs. If that claim is correct, it follows that unilateral implementation by SBC, in the manner set forth in the pertinent Accessible Letters, ignores Section 252 and the ICAs and contravenes the TRRO.

### A. The basis for emergency relief

Subsection 13-515(c) establishes three conditions for emergency relief: "[1] that the party seeking relief will likely succeed on the merits, [2] that the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted, and [3] that the order is in the public interest." The Commission has addressed these conditions in previous proceedings: Order Granting Emergency Relief, Docket 02-0443, July 8, 2002, ("Ameritech Emergency Relief Order"), Order Granting Emergency Relief, Docket 02-0160, Feb. 27, 2002, ("Z-Tel Emergency Relief Order")

Regarding the likelihood of success on the merits, a party seeking a preliminary injunction in the Illinois courts need not prove its entire case with respect to an asserted right. Instead, it is required only to show that it raises a "fair question" about the existence of that right and "that the trial court should preserve the status quo until the case can be decided on its merits." C D Peters Co. v Tri-City Regional Port District, 281 Ill. App. 3d 41, 47, 216 Ill. Dec. 876, 880, 666 N.E. 2d 44, 48 (5<sup>th</sup> Dist. 1996). The Commission applied that standard in the Ameritech Emergency Relief Order and in the Z-Tel Emergency Relief Order.

In the TRRO, the FCC plainly stated that "carriers must implement changes to their [ICAs] consistent with our conclusions in this Order." TRRO, ¶233. Thus, there is no question that the parties here will have to revise their ICAs to reflect the FCC's current view of availability and pricing for the UNEs addressed in the TRRO. Accordingly, SBC's intention to transact business with Complainants in a manner that differs from certain substantive provisions of the parties' existing ICAs is supported by the TRRO. For purposes of emergency relief, however, the question is whether SBC can ignore certain terms of its ICAs *now*, without first altering the terms of those ICAs.

through bilateral negotiations and, if needed, dispute resolution proceedings, with each Complainant. In other words, the dispositive issue is not whether the parties' ICAs and business dealings must change, but *how* such change must occur and *when* the parties can begin operating under revised terms.

For the purpose of resolving Complainants' emergency relief request, the Commission concludes that Complainants have, at a minimum, raised a fair question of whether the parties must conduct negotiations and, if necessary, utilize dispute resolution mechanisms *prior to* modifying their existing ICAs and transacting business in a manner inconsistent with those ICAs. The FCC flatly stated: "We expect that [ILECs] and competing carriers will implement the Commission's findings as directed by section 252 of the [Federal] Act." TRRO, ¶233. Section 252 contemplates bilateral negotiation and, when needed, arbitration or mediation. It does not contemplate unilateral action, either to alter an ICA or to transact business as if that ICA had already been altered.

SBC expresses considerable concern that negotiation and dispute resolution will result in delayed implementation of the FCC's TRRO directives, adversely affecting SBC. However, the FCC anticipated that some delay would inevitably occur in implementation. The familiar processes described in Section 252 inherently take time, and the FCC did nothing to compress those processes. Instead, it warned carriers to not "unreasonably" delay implementation of the TRRO and encouraged state commissions to guard against "unnecessary" delay. Had the FCC intended that ILECs would unilaterally alter the ground-rules in existing ICAs, and to immediately conduct business under modified terms – that is, if the FCC had intended to avert *any* delay in implementation – it would have said so. But it did not. It prescribed a bilateral process with built-in time requirements.

SBC also takes the position that its Accessible Letters "faithfully track" the TRRO's provisions and, therefore, must be viewed as simple implementation of "unambiguous and unconditional" requirements, not unilateral terms. Response at 7. In effect, SBC is claiming that there is nothing for the parties to negotiate (although SBC does acknowledge that ICA negotiations must take place, albeit while the parties transact business under SBC's new terms). The Commission disagrees, for several reasons.

First, for some of the UNEs involved here, the FCC established numerical impairment thresholds in the TRRO<sup>4</sup>. SBC's Accessible Letters provide no process for determining, or disputing, whether those thresholds have been reached.

Second, the TRRO provides that a CLEC may self-certify that it is entitled to unbundled access to certain UNEs. TRRO, ¶233. When that occurs, the ILEC "must immediately process the request" and utilize ICA dispute resolution mechanisms if it questions the CLEC's self-certification. *Id.* SBC's Accessible Letters appear to turn this

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<sup>4</sup> With respect to DS1 loops, for example, the number of business lines or collocators at a wire center, or the number of loops in a building, will determine the availability of that UNE.



process around, permitting SBC to reject any request it regards as "new," and leaving the burden of dispute resolution to the CLEC

Third, even when it is otherwise undisputed that a "new" UNE need not be provided, as with dark fiber, it must still be provided to the CLEC's "embedded base" during the applicable transition period created in the TRRO. The Accessible Letters assume that the "embedded base" refers to the specific UNEs that will be in place on March 11, 2005. Complainants argue, however, that the "embedded base" refers to existing customers on that date, rather than to the specific UNEs those customers are using. Complaint at 16. Without deciding now whose position is correct - we see support for both positions in the text of the TRRO - this very dispute indicates that implementation of the TRRO is not "unambiguous," as SBC views it.

Complainant's likelihood of success on the merits must also be determined in the context of Section 13-514 of the Illinois Act, which Section 13-515 helps implement. Section 13-514 states that a telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. Complainants have raised a fair question as to whether SBC has violated Section 13-514's general prohibition, as well as the particular *per se* impediments included in subsections 13-514 (6), (8), and (10)<sup>5</sup>.

To be clear, we do not find at this preliminary stage that the substantive provisions in SBC's Accessible Letters plainly contradict the TRRO or any other authority. Rather, we simply hold now that Complainants have presented a fair question of whether the use of the unilateral Accessible Letters, instead of Section 252 processes, to modify the terms under which the parties will presently transact business, is authorized by the TRRO. Indeed, our preliminary conclusion is that the TRRO does not permit such self-help. Moreover, the Accessible Letters do not address, or may wrongly decide, how some of the details of TRRO implementation will be accomplished. For the time being, we believe that the FCC intended for those details to be addressed through bilateral negotiations and, if needed, dispute resolution.

Concerning irreparable harm, we have previously held that such harm need not be beyond the possibility of repair or beyond compensation in damages. Z-Tel Emergency Relief Order, Prentice Medical Corp. v. Todd, 145 Ill. App. 3d 692, 701 (1<sup>st</sup> Dist. 1986). Irreparable harm includes transgressions of a continuing nature, such as damage to the good will or competitive position of a business, which would be incalculable. *Id.* Further, prolonged interruptions in the continuity of business relationships can cause irreparable damages for which no compensation would be adequate. *Id.*

According to Complainants, the principal harm that would allegedly result here is that Complainants would be handicapped in their provision of services to both existing

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<sup>5</sup> *E.g.*, subsection 13-514(8) states that it is a *per se* impediment to the development of competition for a carrier to violate "the terms of or unreasonably delay[] implementation of an interconnection agreement entered into pursuant to Section 252 of the federal Telecommunications Act of 1996 in a manner that unreasonably delays, increases the cost, or impeded the availability

and new customers. Complaint at 44. This would purportedly harm their customer relations and reputation in the marketplace. Moreover, Complainants emphasize that such harm would occur in a competitive context, in which SBC itself would derive benefit from the harm it ostensibly caused Complainants.

SBC responds that Complainants can readily obtain alternative services, whether from SBC or other providers. Indeed, SBC stresses, the FCC found in the TRRO that CLECs face no impairment in connection with certain UNEs precisely because market alternatives are easily obtained. Response at 23.

With respect to the availability of the UNEs involved here, the Commission finds that irreparable harm is a reasonably predictable outcome if SBC were permitted to insist upon immediate compliance with its Accessible Letters. The potential impact of sudden disruption of Complainants' operations, and of the services, service quality and reliability enjoyed by their customers, is sufficient to provide relief now. Moreover, the monetary value of such disruption, along with the value of lost goodwill in the market, cannot be readily quantified for compensation purposes. While alternative suppliers exist, the quality, reliability and cost of their offerings could cause service interruptions, diminished service quality and cash-flow or credit problems for Complainants. Further, Complainants would have to make immediate decisions on these matters (before March 11) and other providers would be aware of, and could exploit, such immediacy. We believe that the FCC, in the TRRO, was very mindful of the need for orderly transitions by carriers. Ultimately, if we denied emergency relief, Complainants might win the battle in this proceeding and still lose the war for customers, because of the repetition of service adjustments (i.e., an adjustment now to comply with Accessible Letters, and a subsequent adjustment if they prevailed on the merits later).

In contrast, with regard to pricing, the Commission cannot conclude that Complainants would suffer irreparable harm if the price increases in the Accessible Letters, which mirror the increases mandated by the TRRO, took immediate effect. Those increases are precisely quantified now and will remain so at the end of this case. Consequently, if Complainants prevail on their underlying Complaint, compensation can be precisely quantified. Thus, while Complainants would suffer harm if SBC incorrectly applies a price increase to a given UNE, that harm would not be irreparable.

Concerning the public interest, we discussed above some of the harm to Complainants' customers that is predictably associated with the harm that Complainants would likely incur from immediate changes to UNE availability. In addition, all telecommunications customers could be adversely affected by damage to the fair and effective competition promoted by the Illinois Act.

As previously stated, since we will order emergency relief with respect to UNE availability, based on our interpretation of the TRRO, Section 252 and the parties existing ICAs, we will not address Complainants' other basis for emergency relief.

## B The contents of emergency relief

The actions required by an emergency relief order under subsection 13-515(e) "must be technically feasible and economically reasonable and the respondent must be given a reasonable period of time to comply with the order" 220 ILCS 5/13-515(e). In this instance, we will require SBC refrain from implementing the terms and provisions of its Accessible Letters, except for pricing provisions that completely and accurately reflect the pricing provisions of the TRRO. Therefore, SBC must continue making the pertinent UNEs available to Complainants without reference to the Accessible Letters or the contents of those letters (except pricing provisions). This requirement to maintain the pre-March 11 status quo is unquestionably technically feasible. It is also economically reasonable, since the terms and conditions in the parties' ICAs have been approved by this Commission. SBC does not argue otherwise. Moreover, SBC is not precluded from implementing the price increases prescribed in the TRRO (because of our ruling, above, regarding irreparable harm).

This emergency Order is effective until the parties have amended their ICAs pursuant to the process contained in Section 252 of the Federal Act or as directed by the Commission in a Order in this proceeding.

## VI. Findings and Ordering Paragraphs

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that

- (1) Complainants are telecommunications carriers within the meaning of Section 13-202 of the Act and are authorized to provide local exchange service within the State of Illinois,
- (2) SBC is a telecommunications carrier within the meaning of Section 13-202 of the Act and is authorized to provide local exchange service within the State of Illinois;
- (3) the Commission has jurisdiction over the parties and the subject matter of this Complaint;
- (4) Complainants have shown that the conduct alleged in the Complaint is likely to have a substantial adverse effect on its ability to provide service to customers,
- (5) Complainants have also shown that they will likely succeed on the merits with regard to immediate implementation of SBC's Accessible Letters, that they will suffer irreparable harm in their ability to serve customers if emergency relief is not granted, and that certain emergency relief described in the prefatory portion of this Order is in the public interest;

(6) Complainants have shown that certain emergency relief described in the prefatory portion of this Order is technically feasible and economically reasonable;

(7) Complainants should be granted the following relief

SBC should be ordered to continue to offer the same UNEs as required by the parties' current ICAs until those ICAs are amended pursuant to Section 252 or as directed by the Commission in its final order in this proceeding.

IT IS THEREFORE ORDERED that Complainants' Motion for Emergency Relief is granted in part and denied in part.

IT IS FURTHER ORDERED that SBC is ordered to continue to offer the same UNEs as required by the parties' current ICAs until those ICAs are amended pursuant to Section 252 or as directed by the Commission in its final order in this proceeding

IT IS FURTHER ORDERED that the relief ordered herein is interim in nature and that the Commission shall conduct a hearing on the remaining allegations of the Complaint.

IT IS FURTHER ORDERED that this decision is not a final order and is not subject to the Administrative Review Law

By decision of the Administrative Law Judge this 9<sup>th</sup> day of March, 2005

David Gilbert  
Administrative Law Judge